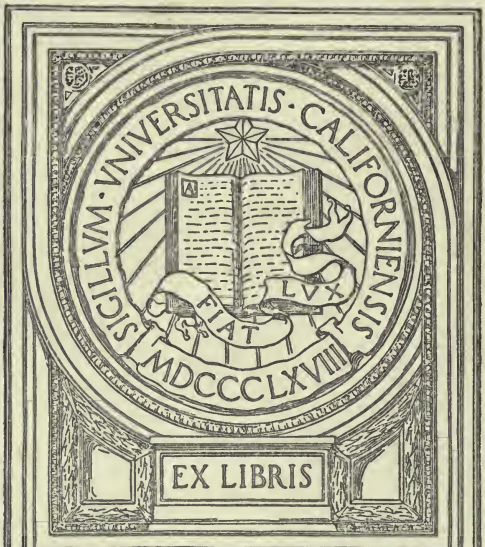
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SPEECH

OF

MR. INGERSOLL,

ON THE

JUDICIARY,

DELIVERED IN THE

CONVENTION,

OF PENNSYLVANIA,

ON THE FIRST OF NOVEMBER, 1837.

PHILADELPHIA,

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SPEECH OF MR. INGERSOLL,

OF PHILADELPHIA,

On the Judiciary, delivered in the Convention to Amend the Constitution of Pennsylvania, November 1, 1837.

Mr. INGERSOLL said, his intention was to listen to the instruction he expected to derive from the discussion of this most important subject, and take no active part till he got from others their better digested views; but, the unexpected turn given to it, by the vote of yesterday, placed him, and probably many others, in a false position, and precipitated him upon the debate before he was, by any means, prepared to do it justice. Yet, he would attempt an argument, addressed altogether to the reason and candor of the committee, studiously avoiding personality and all excitement. If he were even able to be eloquent, he would not on this occasion, and he must take the liberty to say, that the name of Washington,, to overawe us, was as much out of place, as introduced by the venerable and learned Chairman of the Judiciary committee, as it would be in a charge to a jury or other judgment of a court. Let us areason together, as if we were not in formal session, but sitting under the mild moderation of the gentleman in the Chair, (Mr. M'Sherry) we were considering this all-important topic, in free and unreserved conversation. I shall be thankful to any gentleman for all inquiries made of me, as I proceed, and, instead of complaining of interruption, will rejoice in opportunities of endeavoring to make myself perfectly understood. I do believe that the Convention is open, as I profess to be, to that conviction which may result from a frank interchange of opinions, and there are, probably, many members attached, as I am, to some cardinal principle, but undetermined as to its mode of application, and ready to unite upon whatever free discussion may ascertain to be the best issue.

I feel all the disadvantages under which I address, even a forbearing argument to the committee, on this peculiar occasion. Scarce an unworthy motive can be imagined, that has not already been suggested, as impelling those who plead for reform. On the other hand, it is impossible to speak any thing like the whole truth in its advocacy. In the first place, the utterer of offensive, however, honest truth might be indicted, convicted, and punished, as guilty of defamation. And, even if that should not be so, still he must make enemies of the most dangerous kind, for the learned Judge, the chairman of the committee (Mr. Hopkinson) has told us, that there is no man who does not, some time or other, fall within the power of the Judiciary. Judges, he says, are quite as liable as other men to unworthy passions and influences, and I must confess, that I do not feel while discussing them, the natural and proper freedom of debate, in the effort to expose a system by views unavoidably personal.

I agree with that respectable gentleman, in all he says of the importance of the subject, which it is impossible to overrate. The Judiciary is our Providence of this world. All other political elements are but elements; but this is, so to speak, the representation of Divinity on earth.

I concede also, that judicial independence is indispensable to good government; but, I deny, that, in order to be independent, Judges must be irresponsible, or beyond the reach of whatever is the sovereignty of the State.

The view of the learned chairman was first historical, and then argumentative; and, I will follow his method. First, with some notice of antiquity; secondly, of England, and thirdly of our own country.

First—No such tenure as that during good behavior was ever known, until after the English revolution of 1688. Let us, therefore, in the first place, do all ancient and modern nations, except England, the justice to recollect that all those wise and established systems of administering law which have obtained among them, together with their celebrated codes, come down to us without that tenure of judicial office which our Constitution prescribes. And, while I freely acknowledge, that English justice protects personal liberty, much better than that of other nations; yet, as to property, it is at least questionable, whether it is not as well provided for by the administration of it in Italy, and Germany, and France, and Spain. We have beenr eminded to discredit responsible tenures, of many instances of arbitrary judicial proceedings in English State

trials, before the revolution of 1688, which there is no need of controverting. But this committee will not forget, that the great foundations of our laws of property, those noblest monuments of English jurisprudence were laid by Coke, Hale, and other Judges, whose judicial office was mere tenancy at will, under arbitrary and capricious monarchs. The gentleman from Union, (Mr. Merrill,) said something disparaging of the French law, till, by charter, the Judges were rendered irremovable. But, I call his attention to the fact, that the most splendid accomplishment of Napoleon's reign, which will outlive the renown of all his victories, was the code of laws called by his name, framed by Judges and Lawyers dependant on his will.

Secondly—Leaving antiquity and continental Europe for Europe, let us come at once to the act of 1701, which, for the first time, conferred upon Judges, the tenure of good behavior; a vast improvement in their situation, and that of all those who look for impartial justice. But, after all the eulogy bestowed on this amelioration, it was nothing more than a transfer of Judicial dependence, or responsibility, from the Crown to the Parliament, which, in England, represents the sovereignty of the people. In like manner, the French charter contains nothing more than a similar improvement; a great one, to be sure, because it substitutes the nation for a monarch, as the power controlng the judiciary.

Since the British revolution, the constant tendency of mankind has been to greater freedom; to take from the sovereignty of one, and confirm that of the community; until, both in England and France, by reforms and revolutions, greater liberty, in some respects, has been established, than many Americans think compatible with even our free government.

Voltaire, speaking of Queen Elizabeth, says, she loved her people, and then asks, with a sneer, who loves the people? But, whether loved or feared, the people of many nations have now become their acknowledged sovereigns. We have been warned against their mastery, by historical illustrations of its arbitrary excesses, drawn from Grecian, from Roman, and from English history. The delegate from Union even reminded us, that when the author of our religion was accused before Pilate, who was disposed to enlarge him, and told the people, he found no fault in him, that, by their clamorous threats, the Judge was compelled to sacrifice the Saviour of the world. That gentleman must recollect, however, that Pilate, if a Judge, acted from no fear of popular violence, but intimidated by the threats that he would be denounced to Cæsar. It was from fear of Cæsar that he yielded, and not the populace, whom he despised.

George the Third propitiated the people, by the act of 1762; a transaction, which as explained in Smollet's History of England, vol. 10, p. 150, appears, to have been a mere matter of salary, and even that allowance postponed till after the King's death, which did not take place, if I am not mistaken, until 1820. It seems, that, till that time, the English Judges were paid like other persons of the King's household, and all that was accomplished for their independence by the acts of 1701, and 1762, although certainly increasing it, left them still liable to removal, whenever the Parliament addressed the King requesting it. The learned and venerable judge, has repeatedly and earnestly told the committee, that among the best evidence we can have of what is right on this question, are the opinions of learned men. I shall, therefore, ask his attention, and that of the committee, while I read from Boswell's Life of Johnson, p. 175, of 2d vol., what that learned philologist has made known as his opinion; and I cannot refrain from introducing it, with the remark, that Judge Hopkinson, or any other Judge, by inflexible rule of law, would reject even the oath to a simple fact, of any witness, however unexceptionable as a man, proposing to give testimony, much less, pronounce opinion, in any matter in which he had the slightest interest. The opinion of Dr. Johnson, therefore, as perfectly disinterested, as he was undoubtedly well informed, is entitled, according to the philosophy of this legal rule, to much greater weight, than that of any Judge, on this question.

"On Friday, April 14, being Good Friday, I repaired to him in the morning, according to my usual custom on that day, and breakfasted with him. I observed, that he fasted so very strictly, that he did not even taste bread, and took no milk with his tea; I suppose because it is a kind of animal food."

So, added Mr. Ingersoll, this wise man was prepared, and predisposed for the best judgment.

"He entered upon the state of the nation, and thus discoursed: "Sir, the great misfortune now is, that government has too little power. All that it has to bestow, must, of necessity, be given to support itself. Our several ministers, in this reign, have out bid each other, in concessions to the people. Lord Bute, though a very honorable man—a man, who meant well—a man, who had his blood full of prerogative

—was a theoretical statesman—a book minister—and thought this country could be governed by the influence of the crown alone. Then, sir, he gave up a great deal. He advised the King to agree, that the judges should hold their places for life, instead of losing them, at the accession of a new king. Lord Bute, I suppose, thought to make the king popular, by this concession; but the people never minded it; and it was a most impolitic measure. There is no reason, why a judge should hold his office for life, more than any other person in public trust. A judge may become corrupt, and yet, there may not be legal evidence against him. A judge may become froward from age. A judge may grow unfit for his office, in many ways. It was desirable, that there should be a possibility of being delivered from him, by a new king. That is now done, by an act of Parliament, *ex-gratia* of the crown."

If I do not misunderstand the English system, it is, in every respect, an improper standard for ours. Notwithstanding the acts of 1701 and 1762, and, abstemious as the crown is, from interfering in private controversies, its influence with the judiciary, is still, all-powerful in state prosecutions. When I was in England, Colonel Despard, and his associates, were condemned and executed for treason, upon proof, so slight, that upon expressing my surprise, to our minister, Mr. Rufus King, at what I considered the injustice of the result, he told me, that I must have a very imperfect idea of the power of the crown, if I supposed it could not procure, by judicial instrumentality, a conviction in such a case. About the same time, Peltier was prosecuted for a libel, on the first Consul of France, on which occasion again the subserviency of the Judiciary to the Ministry, was abundantly apparent. Thus, controlled by the crown, English Judges, are still more completely controlled by Parliament. Their official tenure, is really, that of *good* behavior. The moment a judge becomes superannuated, or disabled, by any incapacity, for the performance of much severer duties, though better paid, than ours, he is got rid of. He is pensioned off; which relief, is altogether unknown, and probably will be, in our system. The ministerial influence over the judiciary, is, also, very great there, and I have understood, that no one is selected for a judge, without taking care, that he is of the right party politics. When it is recollected, moreover, that English judges do not exercise that political jurisdiction, which is considered a principal function of ours, that the House of Lords, by appelate cognizance, superintend all the judgments of the courts within the kingdom, and the king in Council, as I believe, all those of the foreign provinces, it is plain, that the English system differs otally from ours, both as to tenure and jurisdiction. There, the Judiciary, influenced by the Executive, is strictly responsible to the Legislature, and the kind of independence, attempted by our Constitution, which was an experiment, altogether untried, is unknown in England, or any other country, as it has proved, on trial, in ours, a vicious system, and a failure.

Thirdly.—I come now to America, and will examine, first, our Colonial, and secondly, our independent Judiciary in Pennsylvania; thirdly, with some notice of that of the United States, which has been pressed into the argument, as vindicating in principle, that of Pennsylvania.

Judge Hopkinson's mistake in supposing, if he did, that there ever was a Judiciary in the Colony of Pennsylvania, commissioned during good behavior, was shown in the excellent speech of the gentleman from Union, (Mr. Merrill,) which displayed researches, and developed facts upon this interesting inquiry, as honorable to that gentleman as the candor with which he treated the subject, and may be deemed among the important advantages which this Convention should confer on the community. It is quite clear that no such tenure ever obtained in Pennsylvania, till the present Constitution. In page 24, of Shunk's collection, there is a note which might lead to a different conclusion. But, besides the refutation for which we are indebted to the gentleman from Luzerne, (Mr. Woodward,) a passage or two, which I will read from the 1st volume of Proud's History, p. p. 305, 6, 8, prove, beyond doubt, that Penn, while he lived, never suffered any such Judicial authority, but maintained his own, in the most absolute manner. That it was the constant anxiety and endeavor of the people of this State, to enjoy the advantages of an unshackled Judiciary, is conceded. But their solicitude was, for Judges, like those of the mother country, independent of all influence or control, except that of the people themselves. They wanted Judges responsible to them, and not dependant on those in Europe, over whom they had no power, and with whom they had little sympathy. In 1684, it has been shown by the gentleman from Union, that the Judges were appointed for two years, and so continued until 1706, when the dispute occurred between the Deputy Governor and the Assembly, which has been read from the curious manuscript obtained by that gentleman, out of the archives of the State. The Colonial act of 1727, for which we are also indebted to him, provides for nothing but the jurisdiction of the courts,

without reference to the Judicial tenure. In 1743, when the Governor removed all the Judges of Lancaster county, it is certain they could not have held their commissions during good behavior. The document produced from the second volume of Franklin's Works, in the year 1756, which seems to indicate his attachment to that tenure, implies no more than his solicitude, which, I have no doubt, was common to all the inhabitants of the province, that their Judges should hold office, as the English Judges did, independent of all control, but that of the people. And the act of 1759, the manuscript copy, of which we owe again to Mr. Merrill's laudable industry, puts this matter beyond all question, by rendering the Judges removable on address of a majority of the two Houses of the Legislature to the Governor. The difference between that system of immediate responsibility, and the irresponsibility of the present constitution, is exactly what is now in controversy in this Convention. Let us go back to the provisions of that Colonial act, giving the people complete control over a Judiciary, commissioned during really good behavior, and I see no great objection to the system. If gentlemen are disposed to compromise for some such principle as that, they may not find me very tenacious of any other.

The petition of the United Colonies to the King, in 1774, to be found in the Annual Register, p. 203, and the remonstrance of the Americans in London, p. 230, cited by Judge Hopkinson, are of the same character, and do not, I submit, prove what he produced them for. They are Colonial complaints of metropolitan tyranny. Their whole strain is, that instead of leaving American Judges responsible to the American people, they were rendered independent of them, by either Royal or Parliamentary Abuse of Government. The only complaint always was, that popular control was taken away by royal usurpation. There is no question of tenure in these complaints, from first to last. They had no reference to that subject. Doubtless the American Colonists desired their Judges should be appointed during good behavior, as English Judges were; but they had no idea of a tenure beyond the power of the ordinary action of popular sovreignty, represented in a Legislature. That the Declaration of Independence should be quoted for the Constitutional tenure, infers a dearth of authority for it, since it is well known, that the author of that Declaration is the Apostle of the opposite doctrines, and condemns the life tenure in the following strong terms, which I read from one of the letters published by his family, since his death:

"Let the future appointments of Judges be for four or six years, and renewable by the President and Senate. This will bring their conduct, at regular periods, under revision and probation, and may keep them in equipoise between the general and special governments. We have erred in this point by copying England, where certainly it is a good thing to have the judges independent of the King. But we have omitted to copy their caution also, which makes a Judge removable on the address of both Legislative Houses. That there should be public functionaries independent of the nation, whatever may be their demerit, is a solecism in a republic, of the first order of absurdity and inconsistency."

This retrospect brings us to the Constitution of 1776, by which the longest Judicial tenure was seven years. Having, on a former occasion, spoken somewhat at large of the Judicial features of that Constitution, I shall not dwell upon them now. And I yield, without reserve, what was labored by the honorable chairman of the Judiciary committee, that a large majority of the framers of the present Constitution, as well as of those who framed the Constitution of the Union, partook of the sentiments so well maintained in the Federalist, No. 78, to which that gentleman refers, that a tenure of good behavior, according to the American experiment, was the best. On the other hand, I earnestly insist, that it was an untried experiment, of which mankind, under any form of government, had no former experience; and, upon that postulate, I proceed to show that the experiment has signally failed, and that we must go back again to something more like the British Constitution, and more consistent with the acknowledged sovereignty of the people. We are in the midst of a revolution. Certainly we are. It is the element of our political existence, a revolution which I trust never will end, yet be always bloodless, a peaceable contest with antiquated establishments, and considerate trial of new ones, popular, economical, fiscal Jurisprudential Legislative, Executive and Judicial. I wish that James Wilson and Thomas M'Kean, two of the first and most distinguished signers of the present Constitution, had voices in this assembly. For I feel confident that they would be among the foremost to declare the failure of their Judicial experiment, and to second that reformation of it which is to reinstate the rghts of the masis to control all departments of government.

Distilled to a result, what are all the objections of Messrs. Hopkinson and Merrill, but apprehensions of the people, whom they fear to trust with perfect self-government?

Montesqueir is cited to warn us of the dangers of extreme democracy, Marius, Cromwell and Napoleon are paraded as the Gorgons of a demagogue licentiousness. Even when the constitutional right of petition is appealed to, by the memorial from Fayette, couched in respectful terms, and praying for none but temperate, and I should say judicious reforms, we are told to deprecate town meeting authority, tavern instructions, and idle resolutions, signed by we know not whom, written no one can tell where. Like the General of an army, some unprincipled leader gives the watchword, and immediately his followers decry the best members of a Commonwealth as Aristocrats in one country, or Federalists in another. Lord George Gordon, at the head of a mob, is made to cry no Popery, and rush upon destruction on the one hand, while disappointed suitors, impertinent lawyers, and noisy partizans, on the other, are clamoring against the administration of justice. All this is nothing more than an apprehension we do not feel, and a want of confidence we disown. It can hardly be called argument. It is indeed warning, perhaps wise warning; but it is advice we cannot take, because we have no faith in it. We trust the people. We believe in self-government. Thus far the experiment has never disappointed us. On the contrary, the further it has been carried, the better it has worked; and avoiding all rash, wild, and visionary undertakings, we cannot now be deterred, as experience teaches, to carry out, still further, the great principle of popular sovereignty. We have seen, within the last few days, that in matters of conscience, and of honor, (brought under consideration by the provision against duelling) there are sentiments, and those perhaps among the strongest in human nature which cannot be argued down, or hardly reasoned with at all. Love and politics belong to this category. All that we can do, therefore, is to agree to differ with the venerable chairman of the Judiciary committee, (Mr. Hopkinson,) because our faith is totally different from his. We confide, without fear. He mistrusts, without confidence. We are for reforming back the Judicial tenure to something like the English exemplar, and that of our Colonial forefathers, satisfied that the first experiment of a less popular tenure has entirely failed, and that we must try another. I agree that we must demonstrate its failure, that we must show how the system may be improved by renovation, and that we do nothing unless we act with the will of the people. For my part, I religiously believe, that the voice of the people is a Divine voice, which, once fairly ascertained, is unquestionable, not only in its power, but its good sense and good feeling. I only trust, therefore, because I have implicit confidence. I think it stands to reason, and is an ordinance of the Creator, that a mass of men must be more rational and less selfish, than any one man; that they are less liable to bad passions, than any individual, and better endowed with instincts of salutary regulation and self-preservation. A community must be, a higher oracle of wisdom than any individual, even though that individual, come to be canonized for his virtues, as the father of a country, like Washington himself. And so do my respected friends, the members from Philadelphia, Union, and Chester, (Messrs. Hopkinson, Merrill, and Bell,) in all matters of law, for it is only when they come to politics, that they gainsay popular sovereignty. The common law, to which they are all so much attached, is nothing but the common sense of the common people, whose canons and very rudiments every lawyer is obliged, by his professional religion, to prefer, to whatever may be said to the contrary, by the wisest man that can be appealed to. All Government is but relative to good. Much of it is positive evil. Wisdom is often mere foolishness: and, among the little we know, with any certainty, if there be one thing which, above all others, we may be assured of, from the lessons of Christianity, of the art of printing, and of America, it is that too much Government is an evil, and too much self-Government little to be feared. The learned and venerable member from Philadelphia, with many others, whose superiority I unfeignedly confess, deny or doubt this doctrine, and I cannot say they may not prove to be right at last. He says that man must be a slave, who in his Representative capacity, suffers others to think for him; and to him political pledges are, as he says, inconceivable. Yet, said Mr. I., the 20th section of the 1st article of the Constitution of Michigan, one of the last and best that has been framed, consecrates what is to be found in equally explicit terms, in many of the Constitutions of New England, the right of popular instruction, which that gentleman denies to be a right at all. When, therefore, he warns us not to attempt to be wiser than Aristotle, Cicero, Bacon, and Locke, we differ upon a dividing principle, for I insist that my friends, the three youngest members of this body, (Messrs. Purviance, Butler, and Rogers,) are better informed politicians, more practically conversant with the principles of free Government, than any of those celebrated personages. In short, we reformers go by the mass, when their opinion is well astertained, while the learned and venerable Judge goes by the man, and relies on his individual wisdom.

He is for self-confidence. We are for

SELF-GOVERNMENT. And although deference to his better judgment is habitual with me, yet do I feel an unconquerable prepossession that there is more intelligence and patriotism in the State than in this Convention, and in any large body of people, than in any select class, or chosen number. As to Aristotle, I have carefully studied all that he has written, as far as it has been translated into our language, and I brought with me, to this place, to read in the original, for my edification, that fragment which has been preserved to us of Cicero's treatise on a Republic. Still I deny the capacity of either Aristotle or Cicero, to teach the youngest American as much as he already knows of the practice of Representative Government; for neither of those wise men of antiquity had even the most remote idea of that Representative principle, which is now so familiar to every child. I deny their authority as a Christian, for neither of them could conceive of Christian charity; and I deny their authority as an American, for neither of them believed that there was any world west of the Straits of Gibraltar. A lady of my acquaintance frequently reproaches that vulgar sailor, Columbus, for having discovered this democratic Continent, and cast her lot so far from those more fashionable regions of Europe, which are large enough, she thinks, at all events, for all ladies and gentlemen. In short, Mr. Chairman, I demur to the authority of Aristotle and Cicero, because as neither of them was aware of the true solar system, the mariner's compass, the circulation of the blood, the art of printing, or a common newspaper, gunpowder, or the society of friends—whose wives had not a chemise to their backs, nor even had a common pin for their clothes; I am vain enough to believe that we are better American politicians than we could learn to be from their works. Locke failed, we know, in his attempt at a Constitution for the State of South Carolina; and Judge Bacon, I submit, is not the man whose name should be held up for imitation, on a question of Judicial integrity, and Independence.

Last, in this list of personal authorities, a name was introduced, which I have already said, I think should have been left out of view on this occasion. But, as it has been made the subject of an eloquent appeal to the emotions and reverence of this assembly, I shall not hesitate, as I do not fear, to meet such eloquence by simple argument, and plain fact. I, too, sir, like the learned Judge, have seen that god-like man.—God-like, he was, in size, aspect, presence, and behavior, as much as in the noble properties of his spirit, and the admirable discipline of his temper. I can see him now, with a vivid recollection of his personal appearance, as eloquently described by the venerable Judge, when he stood up in Congress, with, if I mistake not, a sword by his side, and what in Europe is called, a court dress, that is, the garb worn by persons who appear in the presence of monarchs. I never can forget the impressions of such a scene, which might affect a youthful imagination with sentiments that maturer years may somewhat change. Without pretending to determine what is right on such occasions, I shall simply state the fact, that when Washington's first and favorite Secretary, succeeded him in the American Chief Magistracy, he abolished the royal custom of personal address, and sent a message to Congress, which reform, whether right or wrong—and I give no opinion on the subject, but, resting my argument on the mere fact, has probably, proved acceptable to fourteen hundred thousand, of the sixteen hundred thousand voters in the United States.

One of the learned Judge's illustrations, was remarkably characteristic of the intense directness, with which he goes straight, may I venture to add, and I might say, headlong, to any conclusion he believes in. His wish is, often father to his thought. He set up for our example, the Constitution of Massachusetts, from which he read a part to bear the testimony, of such men as Mr. Adams, Mr. Webster, and Mr. Story, to the necessity of that Judicial independence, which he thinks we should cherish. But we go to a different school. We do not worship at that shrine. We do not presume to desecrate it. On the contrary, I repeat my profound respect for it. But by instinct, I am unable to bow down before it. Its religion may be the true one. We, who deny it, may all come to repent our error. But till we do, such arguments, shall I be excused for saying, are in a vein of downright simplicity. At all events they fully justify, that by which I would shew, that on great principles, we must sometimes agree to differ.

Such, then, is the platform, on which we propose to place our contemplated reform of the Judiciary—to bring that branch of government, in better acceptance with the sovereign power, according to what we believe, is its will. And, really, there is but one difficulty connected with this movement, which is, simply, to ascertain, what is that will. This is no party question, but, purely popular. To quote the learned Judge, the people must be the democracy, and the democracy must be the people, in such a question. The candid and manly concession of the gentleman from Union, (Mr. Merrill,) spares me much argument in this ascertainment, for as he truly said how came this Convention, together, but by the will of the people, expressed in its most legitimate forms? We, the representatives, are here to deliberate, and to devise; they, the people, are there, to ponder, and determine such reforms, as may be submitted to them. The venerable Judge has, himself, in strong terms, declared, that it would be madness to resist the people's will, when once properly made known. And can there be a doubt, that they desire their sovereignty to be plenary? Do we not, ourselves, each one, and all of us, wish it to be so? The remarkable quarrel between the Speaker and the Governor, in 1766, as read, from one of those curious manuscripts, which the gentleman from Union, (Mr. Merrill,) has brought to light, the colonial acts of 1727, and 1759, the Constitution of 1776, the petitions and remonstrances, as shown by the gentlemen from Philadelphia, and Luzerne, (Messrs. Brown and Woodward,) to have been, continually pouring into the Legislature, from the people, complaining of the high judicial tenure, as attempted for the first time, by the present Constitution, and our own votes, by one of which, the foundation of the system, Justices of the Peace, have been broken up by change,

from the irresponsible, to a very dependant tenure, together with the vote of yesterday, by which a considerable majority of this Convention, would seem inclined to limit the tenure of all our Judges, without exception—all this concurrent testimony, from the very beginning to the end, proves, beyond a cavil, that the people desire to be their own masters, that this Convention think they should, and not to give that mastery to the Judges. The people of Pennsylvania, have always been a peculiar people, in their jealousy of Judicial supremacy. They never could be brought to tolerate a court of Chancery, which acts arbitrarily, and without what may be called the popular branch of the Judiciary department—a jury; and when, at last, within a short time, some Chancery powers have been conferred by the Legislature, on the courts, they take care to associate a jury, with the Chancellor; and even so, this power was interpolated at a special session of the Legislature, certainly, without the people, or even the profession, being advised beforehand, or prepared for its reception.

Let others say what they may, I subscribe, most cordially, to the patriotic, if you will, the provincial self-complacency of the venerable Judge, than whom his country, and his State, contain no truer lover, that Pennsylvania is foremost in rational improvement, and not behindhand in intelligence, of all other Commonwealths and countries. If this is a prejudice so be it. It is, at any rate an honest and delightful one, which I cherish and inculcate, and without which, I certainly would not live in Pennsylvania. Let the lawyers of other States, and it is chiefly they, who, regarding with affected contempt, our palmy democracy, and, I must add, as they deem it, our Judicial depredation, have denounced us, as a population of stupid Dutch, and wild Irish, the Beotia of America—let them show greater improvements in any of the arts and sciences, of good government, and good society, if they can. I assert, with confidence, and this is part of my political creed, in which, I am very happy to have the concurrece of the venerable Judge, himself, that Pennsylvania is a model State, and that *more* universal suffrage than other States enjoy, *more* popular sovereignty, than their Constitutions allow, the constant promotion of the greatest good, of the greatest number, a system, of which the educated, and the opulent, should be the last to complain, even though it may deprive them of some of the public honors and distinctions—that these are the springs of our pre-eminence, the pure, popular fountains of our prosperity. By their *fruits*, shall ye *know* them. Within a few years past, New York, on one of our borders, and Ohio on another, by rendering their right of suffrage, still more universal, and their Judicial officers still more responsible to the people, than ours, together with other organic improvements, have taken the lead of us in the race of advancement, and it is the duty, as it should be the delight, of this Convention, to submit to the people, for their adoption, such improvements, as all experience has testified to be desirable, so that Pennsylvania may regain, by the renovated republicanism of a still more democratic Constitution, that rank in the scale of States, which the least rottenness of arbitrary government, will be sure to make her lose.

And here, let me answer, not without deferential respect to that venerable gentleman, but with the most explicit contradiction of his unfounded assumption, the claim which he has set up, of the Constitution, to be the parent of the prosperity of this noble Commonwealth. Sir, I pronounce it to be grand larceny, to rob liberty and equality of what belongs to them, and ascribe it to government. All the blessings we enjoy, are the offspring of freedom. Too many of the evils we endure are the inflictions of government, government not strictly and generously popular, which, whenever it undertakes to regulate whatever may be safely left to the people to do for themselves, and of themselves, is always a grievance and often a curse. I must be permitted, here, Mr. Chairman, to read from a late publication, this first of all political truths, so much better explained by a German, than I am capable of expressing it, that I take shame to myself, that an American must be indebted to that enslaved, yet enlightened empire, for its admirable elucidation.

"Liberty is nothing positive; it is but the absence of slavery. Liberty cannot, liberty will not establish any thing but itself; it cannot and will not destroy any thing but despotism. Liberty cannot change a people; it cannot give to a people qualities and virtues denied them by nature; it cannot change them from faults which are born with them, or occasioned by climate, education, history, or ill-fate: Liberty, is in itself nothing, yet every thing, for it is THE HEALTH OF A PEOPLE. As the healthy beggar, with his stony crust of bread, is happier than the rich man at his luxurious banquet, so is a free people, were it to dwell in tho icy regions of the north, without arts, without science, without hope, without a single enjoyment of life, and, wrestling with the bear for its food, happier still than a nation without liberty, though it should have inherited a paradise in its sky, and enjoy a thousand flowers and fruits, spontaneously produced by the soil, or offered by the cultivation of the arts and sciences. Liberty alone can develope all the powers and resources of a nation, in order to make her attain the end for which she was created. Liberty alone can ripen the hidden genius of a people's virtue, as indeed it reveals all its faults, showing which of them are to be ascribed to natural causes, and which to degeneration; separating thereby its healthy qualities from those which, under a semblance of vigor conceal but weakness, or a morbid developement of a certain organ at the expense of all the rest."

So much for general principles, Mr. Chairman; and for their practical application. The Judiciary is the earthly Providence. It is, first, to secure personal liberty, secondly, to preserve property, and, thirdly, to maintain all other Constitutional and Natural rights. According to the 10th

Section of the 9th Article of the Constitution, to do justice, remedy and right, without sale, denial, or delay, and more especially as the 5th Section of that Article enjoins, to keep inviolate that first of all Judicial rights, the right of trial by Jury.

First—The Chairman of the Judiciary Committee read, as he told us, from Clarendon's* account of it, one of the many similar instances that might be fetched from such histories of Cromwell's contumelious treatment of a Court of Justice. It were to be wished, that, instead of such authority, that of a romance, as it may be called, composed in Holland, or in France, at a great distance from the scenes described, seen through the medium of the most distorting animosity, the learned Judge had favored us with even Cromwell's actions, as much more faithfully depicted in Godwin's excellent history of that abused but glorious English Commonwealth, which begat, at the same time, the founders of the English Revolution of 1688, and the American Revolution of 1776. The time has come when the history of those days is better understood, and their giants less disparaged than they used to be by Clarendon, Hume, and all that class of tory fabricators of it. I shall not deny the Judicial irregularities of any of the cases that have been referred to. Ship money, the seven Bishops, Penn's prosecution, and the many other instances of English wrong, any more than those of the Decemvirs and Virginia, for which we were carried all the way to Rome, to learn to dread responsible or popular magistrates. But I shall come at once to our own business and bosoms, in Pennsylvania, selecting a few from the innumerable instances that might be mentioned of those egregious Judicial misdeeds that our vicious system has teemed with. I consider them the infirmities of the system, not of those Judges who ministered under it. The system leads into temptation; it provokes indolence and insolence, cruelty and folly, and those who have been betrayed by it into the excesses, some of which I shall call to mind, are not to be deemed subjects of my personal censure, whilst speaking of the workings and vices of the system itself. The gentleman from Northampton, (Mr. Porter) reminded us of Passmore's case, and delivered an eulogium on the Judges arraigned for that affair. I shall not detract from the characters of the dead; but it belongs to the scope of fair argument to state that a large majority of both branches of the Legislature tried in vain to remove a Judge for implication, to call it by the mildest term, in a stretch of power, so shocking to the sense of the community, that the Legislature, not only of this State, but of many others, and of the United States, have, by special enactment, taken from Courts' and Judges' authority ever to perpetrate again what, whether right or wrong, was extremely odious and shocking to the feelings of all free people. As in former instances throughout this argument, I content myself with stating facts, leaving conclusions to be drawn by others, without presuming to give any opinion of my own. My friend from Luzerne (Mr. Woodward) mentioned an act of despotic judicial impropriety committed by Judge Cooper, and the gentleman from Union (Mr. Merrill) read, as strongly appealing to our best feelings against the dangers of a dependant Judiciary, the detected letter for which Sidney was condemned, and the remarkable case of a Quaker imprisoned, for not taking off his hat. Did it not occur to that learned gentleman, that one of the charges of which Judge Cooper was accused, was committing a Quaker to prison for not takingoff his hat, exactly like the English instance referred to as so abhorrant to our feelings, and that Judge Chase was impeached, and defended by Judge Hopkinson, for the prosecution of that self-same Judge Cooper, for writing a paper not much more obnoxious to just punishment, than that for which Sidney suffered? It is not long since a Judge in the western part of this State, struck a long list of the members of his court from its rolls, and stopped their livelihood for alledged misconduct, which the Supreme Court adjudged to be undeserving that severe infliction. And not many years before, in another part of the State, two respectable members of this Convention were confined in prison, for a considerable period, by a like abuse of Judicial authority, not imputable, I repeat, so much to the Judge as to the system by which he was betrayed into it. A Bishop of the Episcopal Church was, on another occasion, as I understand while a member of the bar, imprisoned by another Judge, under somewhat similar circumstances.—These, Mr. Chairman, are extracts from the catalogue of Judicial mishaps, to say the least of them, in Pennsylvania, into which respectable Judges have fallen, by a system that tends, inevitably, to such aberrations.

Secondly.—That property has not been

*"We suffer ourselves to be delighted by the keenness of Clarendon's observation, and by the sober majesty of his style, till we forget the oppressor and the bigot in the historian"----is the elegant condemnation of *Judge* Hopkinson's authority, by a passage I never saw, till while correcting this sheet for publication.

well secured, I vouch the judicial vindications of the gentleman from Northampton and Beaver, (Messrs. Porter and Dickey) who have both declared that so fluctuating were the adjudications of the Supreme Court, as to occasion great insecurity and inconvenience: and I vouch, with still greater assurance, than even the unquestionable assertions of those gentleman, several acts of Assembly to show that it has been necessary to pass special laws for correcting judicial errors. The delays of justice were such, that my colleague from Philadelphia (Mr. Brown) stated yesterday that he understood from one of the judges of the Supreme Court, that there were, at one period, eight hundred undecided causes in a single district. When the eight hundred suits in one district were mentioned by Mr. Brown, as stated to him by a judge, the delegate from Alleghany, (Mr. Denny) interposed to remove its effect, by saying that there are but eight remaining undetermined there.—To be sure—we are in the midst of a revolution. We have been assured that even when the moon has come more near the earth than she was wont, prodigies have been the consequence. and when the Comet of Convention shakes its fiery tail, it would be very strange if some were not imparted to the earth, and perhaps some uneasiness. I learn from the gentleman from Luzerne, (Mr. Woodward) that when judge Mallary undertook the office, in which my friend from Northampton, (Mr. Porter) says he so much distinguished himself, there were four hundred causes at issue, and untried, in a single county of his district, I think I may say that two, if not three years are the average duration of the few cases tried by the Supreme Court in the city of Philadelphia. The Chairman of the judiciary committee informs us, defensively, that there are, as he says, but four or five judges complained of, of the eighteen or twenty in the State, which, upon his own shewing, is therefore one fourth of the whole number. And I deny the doctrine of disappointed suitors, and vindictive lawyers, provoked by every judgment against them. Such is not the fact. The late Chief Justice Tilghman, who was] what the Emperor Alexander called himself, in a despotic Government, a happy accident in our Judiciary. Judge Washington, and many other judges I could name, did not excite such implacable offence by every judgment they pronounced. What, in a word, is the principal business of the Supreme Court of Pennsylvania, since most unfortunately for the system, as well as for their individual good, the Judges got themselves relieved from the wholesome exercise of circuits, (I do not mean bodily, but professional exercise) and settled down upon the tame functions of a court of revision—what are their *principal* labors but to *reverse* the errors of other courts? If they are so, does it not clearly argue, that either the system, or the administration of it, must be defective? The character of our printed reports, is it not inferior to that of other States; and do not the bench and the bar elsewhere declare; do not the booksellers' account sales prove that it is not equal to others? Uncertainty of law is said to be the most miserable servitude.

Thirdly—Are those Constitutional duties properly performed, which the venerable Chairman of the Judiciary committee, assigns as the great reason why our Judges should be further removed from popular control, than those of England? What political functions has the Supreme Court of Pennsylvania exercised since the accession of the present Chief Justice? That gentleman, in an elaborate argument of self denying efficacy, has repudiated, if I am not mistaken, the right of the court to pass on Constitutional, or what are called political questions, which, from some cause or other, has not, I believe, been done during his presidency in that court. If it is never to be done, if the political power is abjured, and this is high authority for it, both philosophical and practical, then there is an end to the great reason most anxiously urged, for what some consider the independence, and others the irresponsibility of the Judiciary.

Be that as it may, there is another, as I hold the most pernicious irregularity resulting from our bad system, to which I next and earnestly beseech the committee's attention. I mean the absorption, by the higher Judiciary, of all the salutary faculties of the lower in the judicial arrogation, now, become almost universal to determine the facts, as well as the law of almost every case, and to make the verdict what I acknowledge the judgment, but only the judgment ought to be, the creature of the court. Sir, I protest against this much to be deplored and now full grown usurpation, a rank abuse, which ought to be extirpated. I hope we shall be able to engraft some guard for the restoration and inviolability of jury trial into the new Constitution With much deference, but as decidedly as possible, do I differ from the learned gentleman from Northampton, (Mr. Porter) if, as I understood him, he deems the jury less important than the Judge, in the administration of justice, I hold the very contrary. The jury is the palladium of personal liberty, drawn into litigation, and for the most part as important in questions of property. A jury is much less liable to err than a court, and for obvious reasons. That they are so, is indubitably proved by the fact, that, for one verdict set aside, or even complained of, there are, I suppose, ten judgments. The gentleman from Union (Mr. Merrill) informed us, that the imprisonment of a jury in England, by order of a court, was one of the proximate causes of the revolution of 1688, and every one knows with what sturdy independence an English juror, with what respectful consideration an English Judge regards the mystic right of the twelve empanneled laymen, to resolve all the intricacies of fact, all the contrivances of fraud, all the shades of character, and all the properties of guilt or innocence. This great popular right, so momentous even in its political consequences, as preserving popular reverence for the Judiciary, which should never be impaired by the slightest

was the greatest apostle, of the workings of free Government.

There was one argument fell from the gentleman who introduced this subject, which I confess is very impressive with me, for I had never thonght of it before, and thus far, I am at a loss how to answer it: that is, that a limited judicial tenure, frequently expiring and renewable, according to the plan of the minority of the committee, or any similar plan, must tend to enlarge and aggravate that Executive patronage which almost all of us seem to be agreed and anxious to reduce. Snch a consideration makes me halt and hesitate between the Colonial act of 1750, viz: tenure during good behavior always and strictly accountable to a mere majority of the Legislature, and the scheme of occasional expiration of office, adopted in most of the new States, and now proposed certainly with much force of reason and public inclination for Pennsylvania. To use a word which Mr. Madison applied to his predicament in the Convention of Virgnia, I am not so stiffly wedded to either project as to stand by it under all circumstances. It is the principle of complete responsiblity, that I stand up for, so that the judiciary shall not be what is claimed for them, lords paramount for the Government, and beyond the reach of the people.

Mr. Chairman—a few words in conclusion, of appeal to our own responsibility. I know nothing of tactics. I have no confidence in them. Personal or other combinations in this Convention may send its proceedings forth very different from the sense of a fairly united majority. Who the majority are, who knows? Not I, for one; and personally I care as little as I know. Minority is a safe shelter under which I can cheerfully abide. But a fearful responsibility to the people, to posterity and to conscience most go abroad with whatever majority arranges this most vital function of the body politic.

I think, perhaps I flatter myself, that I have shown, that under the present Constitution, and led into temptation by itss too great security, Judges are apt to become supine, vicious, tyrannical, and altogether bad ministers of the law. Do you believe, sir, that any people, any body of men whatever, in this State, could be found, who would imprison a Quaker for not taking off his hat, or that even of a mob, for any offence a couple of gentlemen might give them, would hurry them into jail for a fortnight without, bail, or relief of any sort? Certainly not. No mass of men could be so unmanly. so inhuman: nor could any individual, whether Judge or not, not betrayed by his own passions, original sin, but by being the minister of an unnatural system. In again alluding to these revolting instances, let me not be misunderstood as even blaming the very distinguished man of science, who was the perpetrator of the one, or the mild and amiable gentleman still living, who committeed the other. I blame the system not the man.

If there are members of this Convention who fear to trust the people, and carry out in practice the theory of free Government, who think that in this country it is still unsafe, with all our encouraging experience, to confide even as much as they do in England, and as was done by our Colonial ancestors, let such gentlemen put the curb at once upon self-government. Now is the time, this is the occasion to ask the people to submit to it, to act upon the principle imputed (unjustly imputed, as he says,) to a celebrated letter of a distinguished citizen of this State, now serving his country abroad, and torturing his illustrations into arguments, make at once what is called a strong Government. Possibly the people may be satisfied they are, what they have been called, their own worst enemies, and stultify themselves at the ballot boxes. If not, now is the time, and this is the occasion for trusting free Americans, at least as far as Colonists were, and Englishmen are confided in. Our judicial system has failed, almost by general confession. Judgment against much of it has gone by default; and, for one, I am thoroughly convinced that we shall neither satisfy the spirit of the age, the will of the people, or the honor, I hope we all covet of public benefaction, unless we give judgment against the rest, and order a new trial of the whole.

No one, who has done me the honor to attend to my argument, can be so sensible as I am of its infirmities, its inadequacy to the subject. All I claim is the merit of sincere and well considered conviction, that the constitution is wrong, and may be easily amended, by rendering the judicial office not less independent, but much more responsible, by which, I think, the same men who fill it will be rendered better judges, and their successors better still. How this improvement is to he brought about, I am not very solicitous. I shall, therefore, move to amend the proposition as now before the committee, by striking out all after the word *him* in the fourth line, and inserting what will make the whole paragraph read thus; but without committing myself to any particular preference, but in order to try the sense of this body upon the principle which I cannot abandon, however it may be modified, viz:

"The Judges of the Supreme Court, of the several Courts of Common Pleas, and of such other Courts of Record, as are or shall be established by law, shall be nominated by the Governor, and by and with the consent of the Senate, appointed and be commissioned by him. They shall hold their offices duriug good behavior, but the Governor may remove any judge, upon the address of the representatives of the people, by vote of the General Government."

☞ Please let your neighbor have the reading of this speech.